

United States v. Jones: Fourth Amendment Applicability in the 21st Century

Thomas K. Clancy*

I. INTRODUCTION

“Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.”¹ To control governmental actions, the Fourth Amendment must be applicable. That applicability question is a two sided inquiry: (1) does the governmental activity—which must be either a search or a seizure—invade (2) an individual interest protected by the Amendment?² If one does not know what is protected by the Amendment, then it cannot be determined what the government can do without implicating it. If one does know what is protected, governmental intrusions of that protected interest must be analyzed to determine whether they are considered a search or seizure and accordingly required to be reasonable. *United States v. Jones*³ addressed that applicability question and is the subject of this essay.

Jones is unlikely to have significant precedential value. The Scalia majority opinion offers little that is new: physical trespasses have always been viewed as implicating the Amendment and his opinion is notable primarily for reiterating that baseline view. The concurring opinions of Justices Alito and Sotomayor offer vague observations about various technologies, using the reasonable expectation of privacy formula to project their views. Their comments are more likely to result in confusion rather than guidance for lower courts, illustrating the failings of the expectations framework. The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects.”⁴ Grammatically, there is a relational aspect to the right set forth in the Amendment, which speaks of certain objects protected—people, houses, papers, and effects—but those objects are not absolutely shielded. Instead, the right to be “secure” is protected and I have long advocated invigorating that term and using it as the proper measure of the protection afforded by the Amendment. In contrast, *Jones* is a recycling of twentieth century arguments about property versus privacy that do not adequately

* John T. Copenhaver Jr. Chair of Law, West Virginia University College of Law, visiting endowed chair, 2012–13. Director, National Center for Justice and the Rule of Law, and Research Professor, University of Mississippi School of Law.

¹ *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

² See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 1.2. (2008) [hereinafter CLANCY, *FOURTH AMENDMENT*].

³ 132 S. Ct. 945 (2012).

⁴ U.S. CONST. amend. IV.

confront the issues in the digital age.

II. PROPERTY LAW ANALYSIS

The Fourth Amendment was a creature of the eighteenth century's strong concern for the protection of real and personal property rights against arbitrary and general searches and seizures.⁵ Reflecting that origin, beginning with *Boyd v. United States*⁶ and extending to the latter third of the twentieth century, the Supreme Court framed Fourth Amendment analysis largely in terms of property rights. Property rights analysis was used in two ways. First, in *Boyd*, the Court created a hierarchy of personal property rights, with the permissibility of a search or seizure premised on whether the government had a superior interest in the thing to be searched or seized.⁷ Based on that hierarchy, the Court refused to sanction any search or seizure of certain objects, regardless of the procedures utilized.⁸ *Boyd* marked the first extended treatment of the Fourth Amendment, with the Court giving the Amendment a liberal interpretation out of a concern that a strict construction would allow the "silent approaches and slight deviations from legal modes of procedure" by which "illegitimate and unconstitutional practices get their first footing."⁹ *Boyd* defined the "realm of personal autonomy" protected by the Amendment "largely in terms of property rights."¹⁰

Second, beginning with *Olmstead v. United States*,¹¹ the Court used property law to define constitutionally protected areas and limited the Fourth Amendment inquiry to the protection of tangible items from physical invasions. The *Olmstead* Court was confronted with the question whether the installation and use of wiretaps constituted a search if the taps were placed on telephone lines outside of the suspects' homes and offices.¹² Although acknowledging that *Boyd* had stated that the Fourth Amendment was to be liberally construed, a narrow majority gutted that principle, stating: "[b]ut that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."¹³

The *Olmstead* Court limited the objects protected to tangible things: "The Amendment itself shows that the search is to be of material things—the person, the

⁵ See CLANCY, FOURTH AMENDMENT, *supra* note 2, at § 3.1.2.2.

⁶ 116 U.S. 616 (1886).

⁷ *Id.* at 623.

⁸ *Id.* at 638.

⁹ *Id.* at 635.

¹⁰ Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 580 (1996).

¹¹ 277 U.S. 438 (1928).

¹² *Id.* at 457.

¹³ *Id.* at 465.

house, his papers, or his effects.”¹⁴ Conversations were not protected because they were not on the list of tangible objects specified in the Amendment. The Court also grounded its decision on the belief that there was “no entry of the houses or offices of the defendants.”¹⁵ It reasoned that the telephone lines outside the buildings where the taps were placed were “not part of [a] house or office, any more than are the highways along which they are stretched.”¹⁶ Thus, the interception of the conversations was not an intrusion into an area protected by the Amendment.

The Court also limited the type of governmental activity that was regulated by the Amendment to physical invasions of the protected areas.¹⁷ There was no search or seizure when the wiretaps were installed outside the buildings because there was no physical entry into a house or an office. Recording a conversation, which the Court viewed as akin to eavesdropping, did not entail a physical invasion and, therefore, was not a search or seizure.

Based on *Olmstead*, for much of the twentieth century, the Fourth Amendment only regulated physical trespasses within constitutionally protected areas and searches and seizures of people and tangible physical objects. This is to say that *Olmstead*’s conjunction of literalism and property theory “guaranteed that the Fourth Amendment would be irrelevant as a device for regulating the use of new technologies that allowed the government to invade formerly private places without committing a common law trespass.”¹⁸ The aspect of *Olmstead* that limited the objects protected to tangible things attenuated prior to *Katz*¹⁹ and the Court ultimately recognized that oral conversations could be the object of a search or seizure.²⁰ However, the part of the theory requiring a physical invasion into a protected area remained a cornerstone Fourth Amendment principle until *Katz* in 1967. It was within the defined constitutionally protected areas that a person could be secure.²¹ Justice Scalia, in *Jones*, utilized that conception of the Amendment, and obtained Sotomayor’s concurrence, because it sufficed to dispose of the case.

III. PRIVACY ANALYSIS

Underlying *Boyd* and *Olmstead* were two conflicting visions of the Fourth Amendment, with the former advocating a liberal construction and the latter a literal one. However, because *Olmstead* primarily concerned the areas into which

¹⁴ *Id.* at 464.

¹⁵ *Id.*

¹⁶ *Id.* at 465.

¹⁷ *Id.* at 466.

¹⁸ Cloud, *supra* note 10, at 611.

¹⁹ *Katz v. United States*, 389 U.S. 347 (1967).

²⁰ *E.g.*, *Desist v. United States*, 394 U.S. 244, 248 (1969) (discussing that development).

²¹ *See, e.g.*, *Silverman v. United States*, 365 U.S. 505, 510–12 (1961) (cataloguing cases).

the government could intrude and *Boyd* primarily concerned what objects could be permissibly seized, they did not directly collide. Both of those lines of authority coexisted uneasily until 1967, when the Court rejected property analysis and substituted privacy analysis to measure the scope of the Fourth Amendment's protections. *Warden v. Hayden*,²² written by Justice Brennan, rejected any hierarchy of property rights and any substantive restrictions on the ability of the government to search personal property. *Katz*, the better known but less articulately reasoned case, rejected *Olmstead*'s view that the country was divided into two areas—those that were constitutionally protected and those that were not. In *Katz*, federal agents placed an electronic listening and recording device outside a public phone booth, from which Katz placed his calls.²³ Both *Hayden* and *Katz* asserted that privacy, not property, was the centralizing principle upon which Fourth Amendment rights were premised. The *Katz* Court did not base that conclusion on a broad philosophical view of the Amendment or adopt *Boyd*'s liberal construction of the Amendment. Indeed, it did not even cite *Boyd*. Its decision was premised primarily on extending protection to intangible interests, which was the aspect of *Olmstead* that had been sapped of its vitality before *Katz*.

In contrast, Justice Brandeis, dissenting in *Olmstead*, set forth a broad-based philosophical argument, premised on the language and spirit of *Boyd*.²⁴ Brandeis began with the proposition that, because it was a constitution that the Court was expounding, which was to be applied “over objects of which the fathers could not have dreamed,” the Court had to adopt a construction capable of meeting modern conditions.²⁵ Brandeis emphasized that technology allowed invasions of privacy un contemplated by the Framers and that

“time works changes, brings into existence new conditions and purposes.” Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.²⁶

Brandeis favored giving the Amendment broad scope, stating: “Every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”²⁷

Justice Stewart's opinion for the Court in *Katz* was therefore notable for what

²² 387 U.S. 294 (1967).

²³ *Katz*, 389 U.S. at 348.

²⁴ *Olmstead v. United States*, 277 U.S. 438, 472–75 (Brandeis, J., dissenting).

²⁵ *Id.* at 472.

²⁶ *Id.* at 473.

²⁷ *Id.* at 478.

it did not say. It did not rely on *Boyd* or Brandeis' dissent in *Olmstead*. It offered no broad philosophical basis for its decision; there was no vision. It merely substituted terms: people, not places; privacy, not property. If the promise of *Katz* was that privacy would broaden protections when substituted for property analysis, subsequent decisions demonstrated that that promise has been unfulfilled.²⁸ Instead, the effect of *Katz* was narrow, affirming that the protections of the Amendment extended to intangible interests such as phone conversations.

The Court thereafter adopted the reasonable expectation of privacy test to define, at least in large part, the Amendment's protections.²⁹ That test, from Justice Harlan's concurring opinion in *Katz*, requires that a person exhibit an actual subjective expectation of privacy and that this expectation be one that society recognizes as reasonable.³⁰ This was unlike the majority opinion, which spoke in terms of unadorned "privacy," without modification by any inquiry into subjectivity or reasonableness. Also, unlike the majority, Justice Harlan concluded that the phone booth was a constitutionally protected area. Harlan stated that, although the Fourth Amendment protects people not places, "[g]enerally . . . the answer to that question requires reference to a 'place.'"³¹

The Court's expectation of privacy analysis has many flaws,³² including its lack of textual support in the language of the Amendment. It accordingly leaves the fluid concept of privacy to the vagaries of shifting Court majorities, which are able to manipulate the concept at will. Indeed, it is difficult—if not impossible—to say exactly what the concept means.³³ Justice Scalia has observed that the reasonableness of an expectation of privacy bears an "uncanny resemblance" to

²⁸ CLANCY, FOURTH AMENDMENT, *supra* note 2, at § 3.3. One interpretation of *Katz* was that it collapsed the applicability inquiry into a one-sided question: any invasion of a reasonable expectation of privacy is a search. That view was never adopted by the Court and *Jones* illustrates the continued two-sided nature of the inquiry.

²⁹ *E.g.*, *California v. Ciraolo*, 476 U.S. 207, 214 (1986).

³⁰ *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

³¹ *Id.* One fundamental aspect of Supreme Court analysis until *Katz* was the relational aspect of the concept of security; a person was secure in specified objects—one's person, house, papers, and effects. That analysis was, of course, driven by the language of the Amendment. *E.g.*, *Hester v. United States*, 265 U.S. 57 (1924). *Katz* seemingly decoupled that relationship with a broad substitution of privacy: people, not places were protected. The Court's subsequent cases confronted whether privacy protections were limited to the four objects specified in the Amendment. *E.g.*, *Oliver v. United States*, 466 U.S. 170 (1984). Over the succeeding years, the relational aspect of a person's protected interest to the objects specified in the Amendment has sometimes reappeared. *E.g.*, *California v. Greenwood*, 486 U.S. 35, 43 (1988). In *Jones*, the Court explicitly reaffirmed that relationship.

³² The academic critics are legion but those critics generally embrace privacy as the protected interest and argue that the Court has done a poor job of utilizing it. *See* CLANCY, FOURTH AMENDMENT, *supra* note 2, at § 3.3.5. (collecting authorities).

³³ *E.g.*, Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 439–40 (1997) (ABA task force concluded that it could not define it).

what a majority of the Court concludes is reasonable.³⁴ Beyond self-indulgence and case-by-case conclusions,³⁵ little has been said by the Court that has endured as a reliable measure of the reasonableness of a privacy expectation.³⁶ Addressing the admitted difficulties of the *Katz* analysis, that is, its circularity³⁷ and the concern with judges imposing their own conceptions of expectations of privacy, Justice Alito in his concurring opinion in *Jones* pointed to another fundamental problem:

[T]he *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.³⁸

There is no better demonstration of the self-indulgence and bankruptcy of privacy analysis than Justice Alito's opinion in *Jones*, where he concluded that a physical invasion of a vehicle to insert a GPS device, coupled with short term monitoring of that device, would not implicate any privacy expectation that society would recognize as legitimate.³⁹

To the extent that there are criteria to measure privacy expectations, it was set forth in *Rakas v. United States*,⁴⁰ where the Court observed that the reasonableness of an expectation of privacy is grounded in principles outside the Amendment, with the Court specifically listing real property law, personal property law, and "understandings that are recognized or permitted in society" as bases. The Court explained:

One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all

³⁴ *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

³⁵ See CLANCY, FOURTH AMENDMENT, *supra* note 2, at § 3.3.4., § 3.3.5.

³⁶ Acknowledgments of the possibility of a normative approach are rare. *E.g.*, *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979). A persistent minority view has advocated such an approach. *E.g.*, *California v. Ciraolo*, 476 U.S. 207, 220 n.5 (1986) (Powell, J., dissenting).

³⁷ *E.g.*, *Kyllo v. United States*, 533 U.S. 27, 34 (2001) ("*Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable.").

³⁸ *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring).

³⁹ *Id.* at 964.

⁴⁰ *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment. No better demonstration of this proposition exists than the decision in *Alderman*[v. *United States*, 394 U.S. 165 (1969)], where the Court held that an individual's property interest in his own home was so great as to allow him to object to electronic surveillance of conversations emanating from his home, even though he himself was not a party to the conversations.⁴¹

Rakas's reliance on property law signaled the re-emergence of property law as a source of Fourth Amendment protections but it was used as a *means* to measure the legitimacy of an expectation of privacy. The "understandings" standard, discussed most often by the Court in the context of social guests,⁴² has not proved to be a standard that expands Fourth Amendment protections much beyond that afforded by property law. Indeed, while a liberal Court substituted privacy in lieu of property analysis to expand protected interests, the more conservative Courts that followed after *Katz* often employed privacy analysis as a vehicle to restrict Fourth Amendment protections.⁴³

IV. JONES

In *United States v. Jones*, the Court unanimously found that the attachment of a global positioning system tracking device to an individual's vehicle, and its subsequent use to monitor the vehicle's movements on public streets for 28 days, was a search within the meaning of the Fourth Amendment.⁴⁴ Justice Scalia wrote for a majority of five justices. Justice Sotomayor joined the majority opinion but

⁴¹ *Id.*

⁴² *E.g.*, *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (discussing "understandings" recognized as reasonable by society).

⁴³ CLANCY, *FOURTH AMENDMENT*, *supra* note 2, at §§ 3.3.3.–3.3.4. (tracing that development).

⁴⁴ The agents installed the GPS device on the undercarriage of the Jeep while the vehicle was parked in a public parking lot and monitored it for 28 days, tracking the vehicle's movements. *Jones*, 132 S. Ct. at 948. The Court only determined that the Fourth Amendment was implicated; it did not decide whether the Amendment was satisfied. Left undecided was whether a warrant is required or whether, consistent with the *Carroll* doctrine, probable cause suffices to justify the search of a vehicle. Justice Alito, concurring, stated that "where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant." *Id.* at 964 (Alito, J., concurring).

also wrote a separate concurring opinion.⁴⁵ Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, wrote a separate opinion concurring only in the result.⁴⁶

The various opinions in *Jones*, to be best understood, can be divided into two parts. The first aspect is the actual situation before the Court—the physical invasion of the Jeep to insert the GPS device and its subsequent monitoring. The second aspect is the willingness of the various Justices to opine about devices and surveillance techniques that do not depend on a physical intrusion and Justice Alito’s embrace of the reasonable expectations of privacy test as the sole measure to determine if the Amendment is applicable. I divide the analysis below into those two categories.

A. *Physical Intrusion Plus Monitoring*

Justice Scalia, for the *Jones* majority, relied on the traditional property law framework. Justice Scalia had no problem demonstrating that Jones had a protected interest—a vehicle is an “effect,” one of the four objects explicitly listed as protected by the Amendment.⁴⁷ Frankly, to the extent that he did so, there is nothing significant in his opinion. What appears new in Justice Scalia’s opinion is his recharacterization of how property is used: prior to *Katz*, property was viewed as a protected interest; in *Katz*, that view was rhetorically rejected in favor of privacy as a centralizing principle. However, in the wake of *Katz*, the Court quickly returned property to a central role but that role was often obscured by subsuming property into the reasonable expectations of privacy formula. Hence, a property right was a manner in which a person was said to have a reasonable expectation of privacy. Justice Scalia, in *Jones*, returned to the pre-*Katz* view: property is an independent protected right, not the way in which a person obtains a reasonable expectation of privacy.⁴⁸ However, Justice Scalia did not make property-based analysis the exclusive manner to determine if a person had a protected interest; in contrast to his previously expressed disdain for the reasonable expectation of privacy test, Justice Scalia in *Jones* accepted that test as an additional way for a person to have a protected interest.⁴⁹

Justice Scalia also examined the governmental side of the inquiry: what governmental activity should be considered a “search”? Justice Scalia stated: “By

⁴⁵ *Id.* at 954 (Sotomayor, J., concurring).

⁴⁶ *Id.* at 957 (Alito, J., concurring).

⁴⁷ The vehicle was registered to Jones’s wife but he used it; the majority essentially assumed that Jones had standing as to the Jeep. *Id.* at 949 n.2 (majority opinion).

⁴⁸ See also *Kyllo v. United States*, 533 U.S. 27, 34–36 (2002) (adopting similar view). Cf. *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) (recognizing continued viability of the physical trespass framework after *Katz* to regulate “physical intrusion of a constitutionally protected area in order to obtain information”).

⁴⁹ *Jones*, 132 S. Ct. at 953.

attaching the device to the Jeep, officers encroached on a protected area.”⁵⁰ The trespassory attachment, by itself, was insufficient to implicate the Amendment.⁵¹ In addition, Justice Scalia alternatively indicated that, for a search to occur, the government must have attached the device with the purpose of obtaining information or that there had to be subsequent use of the device.⁵² The various formulations appear to offer two very different predicates for the governmental actions to be labeled a search: the government must actually obtain information or it merely has to seek to obtain information. Perhaps the differences are of no significance in criminal cases (such as *Jones*), given that the information obtained likely would be the incriminating evidence. However, in civil cases, the point at which the search occurred would matter, if the mere attempt to obtain information sufficed. The latter view appears more consistent with previous case law and Justice Scalia’s previously stated views.⁵³

Justice Sotomayor joined Justice Scalia’s opinion to make it a majority, finding the property framework sufficient to resolve *Jones*. However, Justice Sotomayor’s concurring opinion contained the same ambiguity regarding whether a search required an attempt to obtain information or actually obtaining information. Most of Justice Sotomayor’s concurrence, discussed *infra*, detailed her views regarding the reasonable expectations of privacy framework, which “augmented, but did not displace or diminish, the common-law trespassory test

⁵⁰ *Id.* at 952.

⁵¹ The majority’s approach allowed it to leave intact the results in the earlier beeper cases. See *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983).

⁵² Justice Scalia indicated that a search occurred based on the attachment plus, alternatively, the “subsequent use of that device to monitor the vehicle’s movements on public streets,” the physical occupation “for the purpose of obtaining information,” the “information gained,” and the “physical intrusion of a constitutionally protected area in order to obtain information.” *Jones*, 132 S. Ct. at 948–51. He emphasized at one point: “Trespass alone does not qualify, but there must be conjoined with that what was present here: *an attempt to find something or to obtain information*. Related to this . . . is the concurrence’s point that, if analyzed separately, neither the installation of the device nor *its use* would constitute a Fourth Amendment search. Of course not. A trespass on ‘houses’ or ‘effects,’ or a *Katz* invasion of privacy, is not alone a search unless it is done *to obtain information*; and the *obtaining of information* is not alone a search unless it is achieved by such a trespass or invasion of privacy.” *Id.* at 951 (emphasis added).

⁵³ See, e.g., *Kyllo*, 533 U.S. at 32 n.1 (“[w]hen the Fourth Amendment was adopted, as now, to ‘search’ meant ‘[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief’”). Justice Brennan, dissenting in *Lopez v. United States*, 373 U.S. 427, 459 (1963), stated: “In every-day talk, as of 1789 or now, a man ‘searches’ when he looks or listens. Thus we find references in the Bible to ‘searching’ the Scriptures (John V, 39); in literature to a man ‘searching’ his heart or conscience; in the law books to ‘searching’ a public record. None of these acts requires a manual rummaging for concealed objects. . . . [J]ust as looking around a room is searching, listening to the sounds in a room is searching. Seeing and hearing are both reactions of a human being to the physical environment around him—to light waves in one instance, to sound waves in the other. And, accordingly, using a mechanical aid to either seeing or hearing is also a form of searching. The camera and the dictaphone both do the work of the end-organs of an individual human searcher—more accurately.”

that preceded it.”⁵⁴

Justice Alito, in his concurring opinion, rejected as “unwise” the majority’s property-based analysis, viewing it as “strain[ing] the language of the Fourth Amendment,” with “little if any support in current Fourth Amendment case law.”⁵⁵ For himself and three other Justices, Justice Alito asserted that the reasonable expectations of privacy formula is the *sole* measure of a person’s Fourth Amendment rights implicated by a search. Yet, Justice Alito’s broad assertions about the singular role that privacy analysis has had in the wake of *Katz* are not supported by the Court’s cases.⁵⁶ Indeed, no post-*Katz* majority of the Court has ever construed privacy’s role as broadly as Justice Alito did in *Jones*. Justice Alito’s opinion is remarkable for a related reason, that is, he viewed an installation and short term use of a GPS device as not implicating the Amendment.

Justice Alito believed “the Court’s reasoning largely disregard[ed] what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attache[d] great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not

⁵⁴ *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

⁵⁵ *Id.* at 958 (Alito, J., concurring).

⁵⁶ *E.g.*, *Katz v. United States*, 389 U.S. 347, 350 n.4 (1967) (“The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth...And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.”). *Soldal v. Cook County*, 506 U.S. 56 (1992), cited in *Jones*, is a significant post-*Katz* articulation of what the Amendment protects. *Soldal* concluded that the physical removal of a trailer home from a mobile home park by disconnecting it from the sewer and water connections and towing it out of the park was a seizure. The Court stated that a seizure of property occurs when there has been some meaningful interference with an individual’s possessory interest in the property. Justice White, writing for an unanimous Court, proclaimed that “our cases unmistakably hold that the Amendment protects property as well as privacy.” *Id.* at 62. The Court also identified one other interest protected by the Amendment—namely, a person’s “liberty interest in proceeding with his itinerary” unimpeded by the government. *Id.* at 63 n.8. White further opined that the shift in the emphasis in *Katz* and *Hayden* to privacy had not “snuffed out the previously recognized protection of property under the Fourth Amendment.” *Id.* at 64. White repeated *Katz*’s assertion that the Fourth Amendment did not confer a “general constitutional right to privacy” and that, although it protected individual privacy against certain kinds of governmental intrusion, its protections went further, and often had nothing to do with privacy. *Id.* He concluded that what is protected and “[w]hat matters is the intrusion on the people’s security from governmental interference.” *Id.* at 69.

Even Justice Brennan, a primary architect of privacy analysis, wrote that, although one aspect of privacy is the right to keep certain information beyond the scrutiny of public officials, the Fourth Amendment does “not protect *only* information. It also protects, in its own sometimes-forgotten words, ‘[t]he right of the people to be secure in their person, houses, papers, and effects.’” *Illinois v. Andreas*, 463 U.S. 765, 775 (1983) (Brennan, J., dissenting). He observed that, “[b]efore *Katz*, this Court may have focused too much on the ‘security’ aspect of the right of privacy, while giving short shrift to its ‘secrecy’ aspect. In recognizing the importance of secrecy, however, *Katz* did not extinguish the relevance of security.” *Id.* at 776 n.4. He concluded: “[T]he Fourth Amendment protects *security* as well as *secrecy*.” *Id.* at 778.

interfere in any way with the car's operation)."⁵⁷ He also saw the Court's approach as "lead[ing] to incongruous results" and "vexing problems."⁵⁸ His concerns included longer term surveillance using unmarked cars and aerial assistance, radio activation of a stolen vehicle detection system that came installed in a vehicle when purchased, and situations where the government required "or persuaded auto manufacturers to include a GPS tracking device in every car."⁵⁹

B. Obtaining Information Without Physical Intrusion

Jones offered a variety of views and intuitions about the government's use of technology to obtain information without a physical invasion. Justice Alito, who argued that the reasonable expectation of privacy formula was the exclusive test, appeared to reformulate it: "The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated."⁶⁰ Note that the emphasis in Justice Alito's language focuses on the relationship of the government technique to a person's reasonable expectations. The Harlan test, in contrast to Justice Alito's formulation, requires that a person exhibit an actual subjective expectation of privacy and that that expectation be one that society recognizes as reasonable. If either prong is missing, no protected interest is established. Under that formulation, the technique used by the government did not affect the reasonableness of a person's expectation of privacy. Justice Alito appeared to shift the focus from a societal expectations test to a reasonable person test, with no subjective element and a sliding scale of intrusion.

Applying his formula, Justice Alito believed that "relatively short-term monitoring of a person's movements on public streets" did not implicate the Amendment but that "longer term GPS monitoring in investigations of most offenses" did.⁶¹ He saw no need to "identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark."⁶²

Justice Alito said that the Amendment would apply to longer term GPS monitoring of "most offenses" but reserved the question of whether it would apply to "extraordinary offenses" because "long-term tracking might have been mounted using previously available techniques" in such cases.⁶³ That position confuses Fourth Amendment satisfaction with Fourth Amendment applicability: it may be

⁵⁷ *Jones*, 132 S. Ct. at 961 (Alito, J., concurring).

⁵⁸ *Id.* at 962.

⁵⁹ *Id.* at 961.

⁶⁰ *Id.* at 964.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

reasonable to monitor “extraordinary offenses” under circumstances that would not justify monitoring of “most offenses,” but such monitoring does not somehow make the Amendment inapplicable. Nor does the choice by the government to utilize a technique that would otherwise constitute a “search” make the Amendment inapplicable merely because the government could have obtained the information by other means that did not implicate it. Noting the “novelty” of Justice Alito’s framework, Justice Scalia, in his majority opinion, added these criticisms:

[I]t remains unexplained why a 4-week investigation is “surely” too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an “extraordinary offens[e]” which may permit longer observation. What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these “vexing problems” in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.⁶⁴

Moving beyond GPS monitoring, all of the opinions were drawn into the thicket of when the government’s use of surveillance technology implicates the Amendment. Justice Scalia, however, did not go very far.⁶⁵ In *Jones*, he accepted the reasonable expectation of privacy framework as a modern supplement to the traditional property-based analysis. Nonetheless, Justice Scalia intimated that the expectations formula would not protect against non-trespassory surveillance of movements in public. He started with the established principles that “mere visual observation” was not a search and that in *Knotts*, the Court stated that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”⁶⁶ He then observed:

Thus, even assuming that the concurrence is correct to say that “[t]raditional surveillance” of *Jones* for a 4-week period “would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,” our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.⁶⁷

⁶⁴ *Id.* at 954 (majority opinion).

⁶⁵ This is in sharp contrast to Justice Scalia’s majority opinion in *Kyllo*, where he advocated a bold approach. *Kyllo v. United States*, 533 U.S. 27, 41 (2002).

⁶⁶ *Jones*, 132 S. Ct. at 953.

⁶⁷ *Id.* at 953–54.

Justice Sotomayor observed that physical intrusions are “now unnecessary to many forms of surveillance” and that the government could duplicate the monitoring undertaken in *Jones* “by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones.”⁶⁸ In “cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property,” she believed the *Katz* analysis applied.⁶⁹ She agreed with Justice Alito’s comments that those same technological advances also affected “the *Katz* test by shaping the evolution of societal privacy expectations.”⁷⁰ She also agreed “with Justice Alito that, at the very least, ‘longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.’”⁷¹ Note, however, that Justice Sotomayor did not modify that statement with the word “reasonable.” Concerned with a “too permeating police surveillance,” Justice Sotomayor instead offered a vague set of considerations to ascertain if long- or short-term GPS surveillance implicated the Amendment, including the details of the information obtained about the target’s movements, the storage and use of that information, the relative ease of obtaining it compared to other techniques, and the chilling effect on “associational and expressive freedoms.”⁷² She asserted that such GPS monitoring “may alter the relationship between citizen and government in a way that is inimical to democratic society.”⁷³ Referring to the possibility of “a reasonable societal expectation of privacy in the sum of one’s public movements,” she would consider “whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.”⁷⁴

Justice Alito, in his concurring opinion, made several broad observations, suggesting that he too was just discovering the power of technology to gather information. He listed closed-circuit television video monitoring, automatic toll collection systems, “cars equipped with devices that permit a central station to ascertain the car’s location at any time,” and smart phones equipped with GPS devices.⁷⁵ He noted that rise of “‘crowdsourcing’” to report traffic conditions and “‘social’ tools” that “allow[] consumers to find (or to avoid) others who enroll in these services.”⁷⁶ He observed: “The availability and use of these and other new

⁶⁸ *Id.* at 955 (Sotomayor, J., concurring).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 955–56.

⁷³ *Id.* at 956 (citing *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 963 (Alito, J., concurring).

⁷⁶ *Id.*

devices will continue to shape the average person's expectations about the privacy of his or her daily movements."⁷⁷ He added that, "[i]n the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical."⁷⁸ Now, however, devices "make long-term monitoring relatively easy and cheap."⁷⁹ Having said this, Justice Alito indicated that legislative action might be the best solution.⁸⁰

V. THE RIGHT TO BE SECURE

The Fourth Amendment speaks of the right to be secure and, in my view, is the proper measure of the protection afforded by the Amendment.⁸¹ Security from unreasonable governmental intrusion was and is the ability to exclude the government. For example, the foundational case of *Entick v. Carrington*⁸² cited by the *Jones* majority, inextricably linked security with the ability to exclude. After stating that the great end for which men had entered into society was to "secure" their property, the court asserted: "No man can set his foot upon my ground without my licence [sic]."⁸³ Similarly, in his famous oration against the writs of assistance, which allowed customs officials in Massachusetts to search anywhere they desired, James Otis argued that the writ "is against the fundamental principles of law, the privilege of house. A man, who is quiet, is as secure in his house as a prince in his castle[.]"⁸⁴ The history of the founding era is replete with similar observations.⁸⁵ In a meeting of the inhabitants of Boston in 1772, a committee was appointed "to state the Rights of the Colonists."⁸⁶ The committee report, published

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 963–64.

⁸⁰ *Id.* at 964.

⁸¹ For a discussion of the origin and meaning of the word "secure," see CLANCY, FOURTH AMENDMENT, *supra* note 2, at §§ 3.1–3.4; Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 307 (1998).

⁸² 95 Eng. Rep. 807 (K.B. 1765).

⁸³ *Id.* at 817.

⁸⁴ JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772 471 (1865).

⁸⁵ *E.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 144 (1765–69). See also *id.* at 129 (stating that the three rights are: "the right of personal security, the right of personal liberty, and the right of private property"). For representative references to Blackstone's list, see James Otis, *A Vindication of the British Colonies* (1765), reprinted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 558 (Bernard Bailyn, ed. 1965) ("The absolute liberties of Englishmen, as frequently declared in Parliament, are principally three: the right of *personal* security, personal liberty, and private property."); New York Journal article, January 23, 1788, reprinted in 20 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 643 (John P. Kaminski & Gaspare J. Saladino eds., 2004).

⁸⁶ QUINCY, *supra* note 84, at 466.

by order of the town, attacked the writs of assistance as giving “absolute and arbitrary” power to customs officials to search anywhere they pleased.⁸⁷ The report concluded:

Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests broke open, ravaged and plundered Flagrant instances of the wanton exercise of this Power, have frequently happened in this and other seaport Towns. By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable. These Officers may under the color of Law and the cloak of a general warrant, break through the sacred Rights of the Domicil, ransack Mens [sic] Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.⁸⁸

The Framers valued security and intimately associated it with the ability to exclude the government.

As noted, well before *Jones*, post-*Katz* assertions that the Amendment protected something other than—or in addition to—privacy increased, reflecting the inadequacy of the privacy standard as descriptive of a person’s protected interest. On some occasions, the word “security” was studiously applied.⁸⁹ For example, in *Terry v. Ohio*,⁹⁰ which involved the stop and frisk of a person, the Court emphasized the words chosen by the Framers, asserting that the “inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”⁹¹ Indeed, the Court said: “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”⁹² The Court asserted that the issue in *Terry* was whether the person’s “right to personal security was violated” by the on-the-street encounter.⁹³

The post-*Katz* era Court and many commentators have often confused the reasons for exercising the protected right with the right itself. A purpose of exercising one’s Fourth Amendment rights might be the desire for privacy but the individual’s motivation is not the right protected.⁹⁴ The Fourth Amendment acts

⁸⁷ *Id.* at 467.

⁸⁸ *Id.*

⁸⁹ See, e.g., *supra* note 56.

⁹⁰ 392 U.S. 1 (1968).

⁹¹ *Id.* at 8–9.

⁹² *Id.* at 9 (citing *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

⁹³ *Id.*

⁹⁴ Indeed, one concept of privacy is simply the power “to control access by others to a private

negatively—to exclude. There is no security if one cannot exclude the government from intruding. To look beyond the right to exclude and seek positive attributes to the right to be secure, whether those attributes be called privacy or something else, serves to limit—and ultimately defeat—that right.⁹⁵ The Fourth Amendment is an instrument—a gatekeeper that keeps out the government. The gatekeeper does not ask why one desires to exclude the government; it simply follows orders.⁹⁶ As a gatekeeper, the Amendment permits other rights to flourish. However, the purpose of exercising one's Fourth Amendment rights neither adds to nor detracts from the scope of the protection afforded by the Amendment.

The privacy era cases have value because they afforded protection to intangible interests against non-physical intrusions. But it was this concern with extending protection to intangible interests and guarding against non-physical invasions that served to distort Fourth Amendment doctrine. The most recent illustration is Alito's concurring opinion in *Jones*. Little interpretative skill is needed when the government physically invades. *Olmstead* and *Jones* demonstrate that point. The problem arises when the government uses non-physical investigative techniques to obtain information. In such situations, the admonition of *Boyd* must be understood and applied: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property" that violates the Fourth Amendment.⁹⁷ This is a call for a normative, liberal approach to interpreting the Amendment. The inquiry must examine the essence of what the Amendment seeks to protect: the right to be secure—that is, the ability to exclude the government from prying.

In today's society, technological and other advances preclude the ability to

object (to a private place, to information, or to an activity). [It] is the ability to maintain the state of being private or to relax it as, and to the degree that, and to whom one chooses." STANLEY I. BENN, *A THEORY OF FREEDOM* 266 (1988). If privacy is only the power to exclude, there is no reason to refer to the concept, which serves only to confuse what the individual's right is, particularly given the many uses that "privacy" has. Cf. Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 284 (1993) ("Whatever privacy means, it surely must include the right to exclude others.").

⁹⁵ Cf. Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825, 827 (1989) ("[T]he Framers did not attempt to define the contours of a comprehensive right to privacy. Rather, they attempted to construct a restraint upon governmental action.").

⁹⁶ Cf. *Warden v. Hayden*, 387 U.S. 294, 301 (1967) ("On its face, the [Fourth Amendment] assures the 'right of the people to be secure in their persons, houses, papers, and effects . . .,' without regard to the use to which any of these things are applied."); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 85 (1974) ("It would misconceive the great purpose of the amendment to see it primarily as the servant of other social goods, however large and generally valuable."); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) ("Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference.").

⁹⁷ *Boyd v. United States*, 116 U.S. 616, 630 (1886).

shield anything absolutely. To adequately protect and give recognition to the ability to exclude, normative values must be employed. Do the precautions taken by the person objectively evidence an intent to exclude the human senses? Does the particular surveillance technique utilized by the government defeat the individual's right to exclude? Would the "spirit motivating the framers" of the Amendment "abhor these new devices no less" than the "direct and obvious methods of oppression" that inspired the Fourth Amendment?⁹⁸ The answer to those questions is always a value judgment.

*Kyllo v. United States*⁹⁹ was the most recent case prior to *Jones* examining in detail what the Amendment protects. The Court determined that the use of a thermal imaging device aimed at a house to learn something about the interior—the relative heat of various locations in the house—was a search. The Court's language had much more in common with *Olmstead* than *Katz*. Yet, the Court retained the essential lesson of *Katz*, which is not that the Fourth Amendment protects privacy, but that the interests protected by the Amendment include tangible and intangible interests and that the mode of invasion into those interests is not limited to physical intrusions. The majority opinion of Justice Scalia stressed the traditional importance of the home: "'At the very core' of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."¹⁰⁰ *Kyllo* rejected drawing the line as to what constitutes a search based either on the sophistication of the surveillance equipment or on the "intimacy" of the details that are observed.¹⁰¹ Instead, it drew the line by analogy to a physical invasion: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search."¹⁰² The "focus," according to the Court, was "not upon intimacy but upon otherwise-imperceptibility."¹⁰³

Kyllo illustrates the security model of Fourth Amendment rights: the individual has the right to exclude the government from unreasonably searching or seizing any of the four objects the Amendment explicitly protects. After *Kyllo*, the individual need not give a reason for excluding the government; she need only assert that it is her house. The same is true in *Jones*: the individual need not explain why he seeks to exclude the government from and using his vehicle as a device to track him; it is his right to exclude the government. Note that the search in *Kyllo* was not a physical invasion but that the search in *Jones* was. The security afforded by the Amendment protects against both types of activity. A search

⁹⁸ *Goldman v. United States*, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting).

⁹⁹ 533 U.S. 27 (2001). See generally Symposium, *The Effect of Technological Change on Fourth Amendment Rights and Analysis*, 72 Miss. L.J. 1 (2002).

¹⁰⁰ *Kyllo*, 533 U.S. at 31 (citing *Silverman v. United States*, 362 U.S. 505, 511 (1961)).

¹⁰¹ *Id.* at 37.

¹⁰² *Id.* at 34 (citing *Silverman*, 362 U.S. at 512).

¹⁰³ *Id.* at 38 n.5.

occurs when the police learn something about the protected object that would otherwise have been imperceptible absent a physical intrusion or its technological substitute. Any such intrusion must be justified as reasonable. Of course, such a framework does not free the Court from difficult line drawing. But at least there is a coherent framework.

VI. THIRD PARTY DOCTRINE AND THE DIGITAL AGE

There is an extraordinary amount of information held by third parties and potentially exploited by law enforcement. Broadly speaking, there are two categories of substantive data that are of concern: the use of networks and the Internet to transmit information from one party to another, such as the body of an email, and the use of cloud based services to store, share, or process data. In the non-digital world, if a third party discloses information to the government that an individual has provided to that third party, the individual typically will not have an interest protected by the Fourth Amendment.¹⁰⁴ This is based on the Court's view that no Fourth Amendment protection exists where a wrongdoer has a misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.¹⁰⁵ Such a "risk," according to the Court, is "probably inherent in the conditions of human society."¹⁰⁶ This is consistent with the Supreme Court's view that voluntary exposure to the public eliminates Fourth Amendment protection.¹⁰⁷

Justice Sotomayor in *Jones* questioned the application of the third party doctrine's application to "the digital age," maintaining that it was "ill suited" because "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."¹⁰⁸ She commented on many of the digital search and seizure issues that have been circulating for more than a decade in the lower courts:

People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice Alito notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain

¹⁰⁴ *E.g.*, *United States v. Miller*, 425 U.S. 435, 443 (1976).

¹⁰⁵ *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

¹⁰⁶ *Id.* at 303.

¹⁰⁷ *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹⁰⁸ *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.¹⁰⁹

These comments underline one fundamental flaw of the *Katz* framework: Justice Sotomayor's willingness to project her concept of privacy expectations as being coextensive with society's and hence reasonable. Further, her brief comments about reconsidering the third party doctrine in a case where it was not in issue seem completely random.¹¹⁰

When does one have the right to exclude the government from searching?¹¹¹ When one has taken steps to exclude: close the door; close the drapes; seal the letter in an envelope; enter into a contract for a self-storage locker or a safe deposit box. Thus, for example, *Katz* took steps to exclude the unwanted ear by closing the door to the telephone booth.¹¹² Renters have a protected interest in storage

¹⁰⁹ *Id.*

¹¹⁰ In contrast, in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), where it should have been in issue, no Justice commented on the doctrine. *Quon* involved a police officer who used his government-issued pager for personal communications; the City, which had the contract with the provider, obtained records of the communications from the provider and an issue was whether *Quon* had a privacy right in those records. Justice Kennedy, writing for the Court, initially assumed that *Quon* had a protected interest but found the search reasonable. Nonetheless, Justice Kennedy discussed possible considerations as to when a person would have an expectation of privacy in communications, including: cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated. *Id.* at 2630. Justice Scalia, concurring, found the discussion "unnecessary" and "exaggerated." *Id.* at 2635. He criticized the expectations formula as unworkable: "Any rule that requires evaluating whether a given gadget is a 'necessary instrumen[t] for self-expression, even self-identification,' on top of assessing the degree to which 'the law's treatment of [workplace norms has] evolve[d],' is (to put it mildly) unlikely to yield objective answers." *Id.*

¹¹¹ As to seizures, the right to exclude is an incident of ownership or rightful possession of the property. *E.g.*, *United States v. Karo*, 468 U.S. 705, 729 (1984) (Stevens, J., concurring and dissenting) ("The owner of property, of course, has a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes."); *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) (acknowledging "inherent" privacy rights in property possessed or controlled). Hence, I agree with Justice Stevens in *Karo* that it would make no difference whether a GPS device is installed prior to or after the owner gains possession of the object. *See Karo*, 468 U.S. at 729 n.2 (Stevens, J., concurring and dissenting). If the government uses a person's property as part of a surveillance system, the Fourth Amendment should regulate that activity. That, in my view, is the essential lesson of cases such as *Silverman*, which Justice Stevens discussed in *Karo*. *Id.* at 729–30 (Stevens, J., concurring and dissenting).

¹¹² *See Katz*, 389 U.S. at 351–52 (Fourth Amendment protects information that a person "seeks

lockers.¹¹³ The same is true in the digital world: encrypt the body of the email; enter into a contractual relationship with a cloud computing service that offers privacy. The Internet is not structured to protect privacy; one must take steps to exclude. It is more like a shopping mall where there is no right to exclude (or have privacy). Indeed, unlike the relatively passive invitations to shop that stores offer in a mall, Internet service providers and websites are designed to obtain information about those using the services and to exploit that information. Like Katz, those seeking to prevent the prying must take steps to do so. An encrypted email message is the same as a letter in a sealed envelope;¹¹⁴ surely the government could open that flimsy white envelope and it may now have the capacity to decrypt the message. But in both situations, the person has taken steps that, normatively, society acknowledges as reasonable (to use privacy analysis) and to exclude (to use security analysis).¹¹⁵ An unencrypted email is not like a letter—it's like a post card. There are now a variety of web-based services that offer remote storage and computing. These, in my view, are akin to a self-storage unit; the parties enter into a contract that, normatively, gives the individual a protected interest.¹¹⁶

VII. CONCLUSION

The Fourth Amendment is an instrument but it can only do so much. The Court's inability to give guidance—any coherent framework—to new technologies is particularly troublesome. *Jones* is but the most recent failure. Justice Scalia espoused a framework that is out of fashion with many scholars and other

to preserve as private”).

¹¹³ *Karo*, 468 U.S. at 720 n.6.

¹¹⁴ *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (“Letters and sealed packages . . . are as fully guarded against examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles.”). *Jackson* distinguished letters from mail open to inspection, such as newspapers and magazines. *Id.*

¹¹⁵ *Cf. United States v. Ganoe*, 538 F.3d 1117, 1127 (9th Cir. 2008) (person posting files in folder on his computer to share on peer-to-peer network has no legitimate expectation of privacy and asserting that he “lacked the technical savvy or good sense to configure LimeWire to prevent access to his pornography files is like saying that he does not know enough to close his drapes.”).

¹¹⁶ The contract framework does not work for email. There are a variety of service agreements, and some are protective of privacy and some are not. *Compare United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (finding expectation of privacy in emails obtained from ISP) *with United States v. Warshak*, 532 F.3d 521 (6th Cir. 2008) (en banc) (cataloging varieties of ISP agreements and using a contract analysis to opine that a legitimate expectation of privacy varied with the terms of the agreement). More fundamentally, however, once one sends an email, it passes through many service providers, most of which are not bound by the contractual agreement that one has with the person's internet service provider. Hence, if an email is sent by X using ISP#1 to Y, who has a contract with ISP#2, ISP#2 is in no way bound by X's agreement with ISP#1. The government could acquire the email from ISP#2 without implicating X's contractual rights. If X encrypts the email, that manifestation of the intent to exclude applies to all intermediaries. Of course, the recipient who decrypts the email could still give it to the government.

members of the Court; however, that analysis at least provides a workable formula to regulate physical intrusions. Justice Scalia, however, offered in *Jones* no real guidance for the more important ways in which the government can obtain information in today's world, that is, through technology that does not involve physical invasions.

In my view, the right to exclude agents of the government is the essence of the security afforded by the Fourth Amendment. This was the core understanding expressed in the physical trespass theory of *Olmstead* and is also strongly evident in *Jones* and *Kyllo*. The ability to exclude must extend to all invasions, tangible and intangible, and must protect both tangible and intangible aspects of the Amendment's protected objects. That was the essential lesson of *Katz*; *Kyllo* and *Jones* appear to accept that lesson, most obviously as to the physical trespass in *Jones*, but also as to the non-physical invasion in *Kyllo*.

If one extends that vision to all of the objects protected by the Amendment, with the understanding that those objects include both tangible and intangible qualities that can be the subject of either physical or non-physical invasions, the proper scope of its protections is understood. The burden is on the individual to take steps to exclude the government: draw the drapes; encrypt the file before pushing the send button. Those steps to exclude do not have to be absolute—there has always been a normative component. Once the individual has taken those steps to exclude, the burden is on the government to justify its searches or seizures as reasonable.

